No. 05-11622

In the Supreme Court of the United States

JOHNNY SWANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his convictions based on his claim that the district court allegedly erred in calculating tax loss at sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A3) is not published in the *Federal Reporter*, but is reprinted in 161 Fed. Appx. 270. The opinion of the district court (Pet. App. B1-B2) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 3, 2006. A petition for rehearing was denied on March 13, 2006 (Pet. App. C1). The petition for a writ of certiorari was filed on May 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of one count of corruptly endeavoring to

obstruct and impede the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a), and four counts of filing false employment tax returns, in violation of 26 U.S.C. 7206(1). The court of appeals affirmed. *United States* v. *Swanson*, No. 96-4213, 1997 WL 225446 (4th Cir. May 5, 1997) (per curiam) (judgment noted at 112 F.3d 512 (Table)). Petitioner sought relief under 28 U.S.C. 2255. The district court denied petitioner's Section 2255 motion; the court of appeals denied a certificate of appealability, *United States* v. *Swanson*, No. 97-7580, 1998 WL 89723 (4th Cir. Mar. 4, 1998) (per curiam) (139 F.3d 896 (Table)); and this Court denied certiorari, *Swanson* v. *United States*, 525 U.S. 880 (1998). Petitioner then filed motions for reconsideration of his conviction and sentence, which the district court denied. Pet. App. B1-B2. The court of appeals affirmed. Pet. App. A2-A3.

1. A jury found petitioner guilty of one count of corruptly endeavoring to obstruct and impede the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a), and four counts of filing false employment tax returns, in violation of 26 U.S.C. 7206(1). At sentencing, the district court found that petitioner was responsible for tax loss in excess of $5.4 million. Based on that finding, the court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. *Swanson*, 1997 WL 225446, at *1.

The court of appeals affirmed. *Swanson*, 1997 WL 225446. Petitioner argued on appeal, *inter alia*, that the district court had overstated the tax loss he caused. The court of appeals rejected that argument, holding that the district court was entitled to rely on the determination of the presentence report that petitioner had caused over $5.4 million in tax loss. The court of appeals ob-

served that petitioner had "also evaded payment of corporate taxes and failed to pay taxes on embezzled income and none of these amounts were included in the loss calculation." *Id.* at *4. Accordingly, the court held, "the district court properly noted that the pre-sentence report's loss figure 'is probably a conservative estimate.'" *Ibid.*

2. Petitioner unsuccessfully sought relief under 28 U.S.C. 2255, see *Swanson*, 1998 WL 89723, and unsuccessfully sought directly to appeal his convictions a second time, *United States* v. *Swanson*, No. 99-6173, 1999 WL 177353 (4th Cir. Mar. 31, 1999) (175 F.3d 1018 (Table)). Petitioner completed his sentence and was released. See Pet. 6.

Petitioner subsequently filed the present actions, which were styled as a "Motion for Consideration of Evidence and Adjustment to conviction/sentencing," "Motion Requesting Review, Consideration of Evidence, and for Adjustment of Conviction and/or sentencing," "Motion for a Conference Hearing," and "Motion for Interim Relief." Pet. App. B1. Those motions, *inter alia*, asked the district court to reconsider the amount of tax loss it had found at petitioner's sentencing. *Ibid.* The district court denied petitioner's motions, holding that he was barred from re-litigating the amount of tax loss because the court of appeals had "reviewed this precise issue when [petitioner] initially appealed it, and * * * found no error in this Court's tax loss finding." *Ibid.* The district court further held that its "previous rulings were correct for the reasons stated." *Ibid.*

The court of appeals summarily affirmed in an unpublished, per curiam opinion. Pet. App. A2-A3. The court concluded that petitioner's motions "challeng[ed] his conviction and sentence" and therefore "amounted to

successive 28 U.S.C. Section 2255 * * * motions," that petitioner therefore was required to obtain authorization from the court of appeals before filing his successive motions in the district court, and that petitioner had failed to obtain such authorization. Pet. App. A3; see 28 U.S.C. 2244(b)(3)(A); 28 U.S.C. 2255 para. 8.

ARGUMENT

Petitioner argues (Pet. 7, 14-16) that alleged errors by the district court in calculating tax loss entitle him to a writ of error coram nobis vacating his convictions. That fact-bound contention lacks merit and does not warrant review.

1. Historically, a convicted defendant who was no longer in federal custody could seek to have his conviction vacated by bringing a motion for a writ of error coram nobis under the All Writs Act, 28 U.S.C. 1651(a). *United States* v. *Morgan*, 346 U.S. 502, 512-513 (1954).[1] Coram nobis relief was available only if serious errors "rendered the proceeding itself irregular and invalid." *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979) (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)). A writ of error coram nobis may be granted only if (1) the alleged error is "of the most fundamental character," (2) "no other remedy [is] available," and (3) "sound reasons exist [] for failure to seek appropriate earlier relief." *Morgan*, 346 U.S. at 512 (quoting *Mayer*, 235 U.S. at 69). This Court has explained that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate." *Carlisle* v. *United States*, 517 U.S. 416, 429

[1] By rule, the writ of coram nobis is not available in civil proceedings. See Fed. R. Civ. P. 60(b). Thus, petitioner's challenges to various tax liens and civil judgments (Pet. i, 7) must fail.

(1996) (alteration in original) (quoting *United States* v. *Smith*, 331 U.S. 469, 476 n.4 (1947)).

Petitioner bases his claim for coram nobis relief on alleged errors in the tax loss finding made by the district court at sentencing. Petitioner asserts (Pet. 5) that he was "recently provided" with evidence of tax loss that had not available to him during his trial. Any such evidence could not entitle petitioner to coram nobis relief concerning his convictions. That is because the amount of tax loss found by the district court was irrelevant to petitioner's guilt or innocence of his crimes of conviction.

Tax loss is an element neither of obstructing the administration of the internal revenue laws, see 26 U.S.C. 7212(a), nor of filing false tax returns, see 26 U.S.C. 7206(1). The jury at petitioner's trial therefore was not asked to determine whether petitioner's offenses caused any tax loss or the amount of any such tax loss. Instead, the district court performed tax loss calculations solely for purposes of sentencing. See *Swanson*, 1997 WL 225446, at *4. Accordingly, even assuming, *arguendo*, that the district court's tax loss figures were incorrect, petitioner's convictions would still stand. Apart from disputing the tax loss calculations, petitioner raises no challenge to the essential facts underlying his convictions.[2]

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[2] Petitioner alleges (Pet. 4, 16) that his indictment was issued after the six-year statute of limitations had expired. The court of appeals considered and rejected that argument on direct appeal. See 1997 WL 225446, at *2-*3. Because the court of appeals decided that question on the merits on direct appeal, it is not open to collateral attack. Cf. *Withrow* v. *Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring) (noting the general rule barring collateral review of constitutional claims rejected on direct appeal). Petitioner also suggests, without explanation (Pet. 4, 15), that the district court used an incorrect version of the Sentencing Guidelines. Petitioner does not appear to have raised

Petitioner also appears to allege a violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), contending (Pet. 15) that the government failed to turn over "vital evidence" pertaining to tax loss. As with petitioner's allegations of errors in the tax loss calculations, even if petitioner could prove a *Brady* violation with respect to the evidence concerning the amount of tax loss, he still would not be entitled to an order vacating his convictions. Moreover, petitioner does not identify the allegedly withheld evidence or indicate how it could have affected his defense. He therefore fails to demonstrate that the alleged failure to turn over evidence prejudiced him in any way for purposes of his *Brady* claim. See *Banks* v. *Dretke*, 540 U.S. 668, 691 (2004).

Furthermore, even if petitioner could show that the alleged errors in calculating tax loss could conceivably have affected his convictions, he has not demonstrated that any errors were in fact "material to the validity and regularity of the legal proceeding itself," as would be necessary to entitle petitioner to coram nobis relief. *Carlisle*, 517 U.S. at 429 (quoting *Mayer*, 235 U.S. at 68). Relief by way of coram nobis, if available at all, is only appropriate under extraordinary circumstances, such as when the defendant is underage, has died before the verdict, or is denied counsel. See *ibid.*; *Morgan*, 346 U.S. at 511-512. This Court has recognized that coram nobis relief generally does not encompass "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and *newly discovered evidence*." *Mayer*, 235 U.S. at 69 (emphasis added). For those rea-

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that argument in either his direct appeal or his petition under 28 U.S.C. 2255, and has identified no justification that would excuse his failure to have raised that argument previously. See *United States* v. *Frady*, 456 U.S. 152 (1982).

sons, petitioner's fact-bound claims concerning the district court's calculation of tax loss do not warrant this Court's review.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner appears to suggest (Pet. 9-11) that the court of appeals erred in treating his motions as successive motions for relief under 28 U.S.C. 2255. He cites *United States* v. *Baptiste*, 223 F.3d 188 (2000), in which the Third Circuit observed that no statute or rule specifically required that a certificate of appealability be obtained before taking an appeal from the denial of coram nobis relief. See *id.* at 189 n.1; see also *United States* v. *Kwan*, 407 F.3d 1005, 1009-1011 (9th Cir. 2005) (holding that requirement to obtain certificate of appealability does not apply in coram nobis proceedings). Because petitioner would not be entitled to coram nobis relief even if the district court had erred in determining the amount of tax loss at sentencing, review of the court of appeals' treatment of petitioner's motions as successive Section 2255 applications is unwarranted.